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7 NOT FOR CITATION

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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IN RE CELERA CORP. SEC. LITIG.,

This Document Relates To:

ALL ACTIONS.

Case No. 5:10-cv-02604 EJD (HRL)

**ORDER RE DISCOVERY DISPUTE
JOINT REPORT NO. 1**

[Re: Dkt. No. 130]

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In this action for alleged securities fraud, plaintiff Washtenaw County Employees' Retirement System sues on behalf of a putative class who reportedly suffered damages in connection with the acquisition of Celera Corporation (Celera) common stock. In September 2012, Judge Davila denied Celera's¹ motion to dismiss the Second Amended Complaint. Plaintiff and Celera then began discovery and subsequently agreed, in September 2013, to a May 2, 2014 fact discovery cutoff.

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Meanwhile, in August 2013, plaintiff moved for leave to file a Third Amended Complaint (TAC) adding PricewaterhouseCoopers (PwC) as a defendant. That motion was granted on October 3, 2013, and plaintiff filed the TAC the next day. PwC has filed a motion to dismiss, which the parties say currently is set for a March 28, 2014 hearing before Judge Davila.

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¹ This court uses the term "Celera" to refer collectively to Celera and individual defendants Kathy Ordonez, Ugo DeBlasi, Joel Jung, and Christopher Hall.

1 At issue in Discovery Dispute Joint Report (DDJR) No. 1 is the scope of discovery, if any,
2 that plaintiff may pursue while PwC's motion to dismiss is pending. Plaintiff argues that the
3 discovery stay, codified in § 78u-4(b)(3)(B) of the Private Securities Litigation Reform Act
4 (PSLRA), does not apply to discovery propounded on Celera, notwithstanding that PwC's motion
5 to dismiss remains pending. Specifically, plaintiff seeks an order compelling Celera to produce its
6 former Vice President of Finance, Heather Abbis, for deposition. Additionally, plaintiff argues
7 that, as Celera's auditor during the relevant period, PwC is obliged to respond to a third-party
8 document subpoena that plaintiff served in October 2012, i.e., before PwC was named as a
9 defendant and at a time when there were no pending motions to dismiss. It claims that PwC has
10 not produced all responsive documents.

11 Celera and PwC contend that the PSLRA stays all discovery until PwC's motion is
12 resolved. After PwC advised of its intent to move to dismiss the claims against it, Celera says that
13 it told plaintiff that it would not produce any witness (including Abbis) for deposition more than
14 once and that all depositions were subject to PwC's right to a stay under the PSLRA. As a
15 compromise, however, Celera is willing to agree that (1) plaintiff may propound non-party
16 discovery that does not require PwC's participation; and (2) Celera will continue to provide
17 documentary discovery as long as that discovery (i) does not require PwC's active participation
18 and (ii) would not subject Celera to duplicate its discovery efforts (e.g., requiring a witness to
19 appear more than once) if PwC's motion to dismiss is denied. (See Dkt. 130, DDJR No. 1 at 10).

20 The matter is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b).
21 Upon consideration of the parties' respective arguments, the court finds that the PSLRA stay
22 applies to all discovery, but will nevertheless adopt Celera's proposed compromise.

23 The PSLRA provides, in relevant part:

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25 In any private action arising under this chapter, all discovery and
26 other proceedings shall be stayed during the pendency of any motion
27 to dismiss, unless the court finds upon the motion of any party that
particularized discovery is necessary to preserve evidence or to
prevent undue prejudice to that party.

1 15 U.S.C. § 78u-4(b)(3)(B). “This section was ‘intended to prevent unnecessary imposition of
2 discovery costs on defendants.’” SG Cowen Securities Corp. v. U.S. Dist. Ct., 189 F.3d 909, 911
3 (9th Cir. 1999) (quoting H.R. Conf. Rep. No. 104-369, 104th Cong. 1st Sess. at 32 (1995),
4 reprinted in 1995 U.S.C.C.A.N. Sess. 731). Another purpose of the stay is to prevent a plaintiff
5 from using discovery to uncover facts to formulate a claim. Id. at 912 (“[T]he district court
6 granted plaintiffs leave to conduct discovery so that they might uncover facts sufficient to satisfy
7 the [PSLRA]’s pleading requirements. This is not a permissible reason for lifting the discovery
8 stay under the [PSLRA].”).

9 Plaintiff argues that where (as here) multiple defendants have brought multiple motions to
10 dismiss, the PSLRA does not require staying discovery against defendants whose motions to
11 dismiss were denied, even though other defendants’ motions remain pending. Courts that have so
12 held have found § 78u-4(b)(3)(B) to be ambiguous. See, e.g., In re Global Crossing, Ltd. Sec.
13 Litig., 322 F. Supp.2d 319, 353 (S.D.N.Y. 2004); In re Lernhout & Hauspie Sec. Litig., 214 F.
14 Supp.2d 100 (D. Mass., 2002); Latham v. Stein, No. 6:08-2995-RBH, 6:08-3183-RBH, 2010 WL
15 3294722 (D. S.C., Aug. 20, 2010).

16 Defendants point out that other courts conclude that the plain language of the PSLRA is
17 unambiguous and requires a stay of all discovery while any defendant’s motion to dismiss is
18 pending, even if some claims are sufficiently pled as to other defendants. See, e.g., In re Finisar
19 Crop. Derivative Litig., No. C06-07660 RMW, 2012 WL 609835 (N.D. Cal., Feb. 24, 2012);
20 Fosbre v. Las Vegas Sands Corp., Nos. 2:10-cv-0210-KJD-GWF, 2:10-01210-KJD-GWF, 2012
21 WL 5879783 (D. Nev., Nov. 20, 2012); Sedona Corp. v. Ladenburg Thalmann, No. 03 Civ. 3120
22 LTSTHK, 2005 WL 2647945 (S.D.N.Y., Oct. 14, 2005).

23 On the whole this court agrees with those who find that the plain language of the PSLRA
24 stays all discovery while any motion to dismiss is pending. Plaintiff has not convincingly
25 demonstrated that particularized discovery is necessary to preserve evidence or to prevent undue
26 prejudice. “Prejudice caused by the delay inherent in the PSLRA’s discovery stay cannot be
27 ‘undue’ prejudice because it is prejudice which is neither improper nor unfair.” In re CFS-Related

1 Securities Fraud Litig., 179 F. Supp.2d 1260, 1265 (N.D. Okla. 2001). “Rather, it is prejudice

2 which has been mandated by Congress after a balancing of the various policy interests at stake in

3 securities litigation, including a plaintiff’s need to collect and preserve evidence.” Id. Nor have

4 plaintiffs “demonstrated a specific instance in which the loss of evidence is imminent as opposed

5 to merely speculative.” Id.; see also SG Cowen Securities Corp., 189 F.3d at 911-12. There

6 seems to be no serious dispute that allowing plaintiff to proceed with Abbis’ deposition now will

7 require PwC to monitor or attend the examination while its motion to dismiss is pending, or may

8 require Celera to produce her again later if PwC’s motion to dismiss is denied. PwC also points

9 out that plaintiff’s cited decisions do not stand for the proposition that discovery may proceed as

10 to newly added defendants, such as PwC, who have not yet tested the adequacy of the allegations

11 against it. Indeed, “a construction of the statute that would allow discovery to proceed as to non-

12 moving defendants would be unfair to the defendants who have filed motions to dismiss because

13 they may, as a practical matter, be required to monitor or participate in the discovery regarding the

14 non-moving defendants before the sufficiency of the complaint against them has been

15 determined.” Fosbre, 2012 WL 5879783 at *3 (citing CFS-Related Sec. Fraud Litig., 179 F.

16 Supp.2d 1260, 1263-64 (N.D. Okla. 2001)).

17 Even so, plaintiff and Celera engaged in discovery between themselves for over a year.

18 And, even Celera agrees that there are categories of discovery plaintiff may conduct now without

19 violating the PSLRA stay. Accordingly, this court concludes that the best balance will be struck

20 by adopting Celera’s proposed compromise, namely: (1) plaintiff may propound non-party

21 discovery that does not require PwC’s participation; and (2) Celera will continue to provide

22 documentary discovery as long as that discovery (i) does not require PwC’s active participation

23 and (ii) would not subject Celera to duplicate its discovery efforts if PwC’s motion to dismiss is

24 denied.

25 SO ORDERED.

26 Dated: February 25, 2014



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 HOWARD R. LLOYD
28 UNITED STATES MAGISTRATE JUDGE

United States District Court
Northern District of California

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